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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

REBEL MOTOR FREIGHT, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION;
UNITED STATES OF AMERICA
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its lawful tariff charges, may a shipper after having refused to pay those charges raise as a defense that they are unreasonable and have the court refer to the Interstate Commerce Commission the issue of the reasonableness of the rates sought to be collected?

And, if the above question is answered in the affirmative,

2. What proof is necessary to satisfy a trial court that a genuine issue of rate reasonableness is present so as to require it to stay proceedings and refer the issue to the Interstate Commerce Commission?

PARTIES TO THE PROCEEDING BELOW

Petitioner in the court below was Rebel Motor Freight, Inc., a Tennessee corporation, who was a motor common carrier regulated by the Interstate Commerce Act.

Appellees in the court below were the Interstate Commerce Commission and the United States of America.

Sunshine Mills, Inc., the shipper, who had originally caused the matter to be referred to the Interstate Commerce Commission was an intervenor as of right.

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INTERSTATE COMMERCE COMMISSION;
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Rebel Motor Freight, Inc. prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this cause on May 28, 1991.

OPINIONS BELOW

The decision of the Court of Appeals was not recommended for full-text publication. It is reproduced as Appendix A hereto.

The ICC decision that was the subject of a Petition for Review in the Court of Appeals was issued in docket MC-C-30140, *Sunshine Mills, Inc. v. Rebel Motor Freight, Inc.* Its unreported decision appears as Appendix B hereto.

GROUNDS FOR THE COURT'S JURISDICTION

The decision of the Court of Appeals was entered on May 28, 1991. No petitions for rehearing were filed. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C §10701(a) provides in relevant part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. §10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 11705(b)(3) of the Interstate Commerce Act,

49 U.S.C. §11705(b)(3) provides:

> A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

Section 11705(c)(1) of the Interstate Commerce Act, 49 U.S.C. §11705(c)(1) provides:

> A person may begin a proceeding under section 10704 or 10705 of this title to enforce liability under section (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title.

Section 11701(b) of the Interstate Commerce Act, 49 U.S.C. §11701(b) provides:

> A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle or a motor carrier or motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath.

FEDERAL JURISDICTION

The cause of action arose under Sections 10761(a) and 11706(a) of Title 49 of the United States Code. Jurisdiction of the United States Court of Appeals For the Sixth Circuit

was invoked pursuant to §2344 of Title 28 of the United States Code.

STATEMENT OF THE CASE

This case is a continuation of the dispute discussed by this Court in its recently decided case of *Maislin Industries, Inc. et al v. Primary Steel, Inc.*, 497 U.S. _____, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). However, this cause arrives here on a procedurally different track.

Petitioner, Rebel Motor Freight, Inc. (hereafter Rebel), like Maislin, was a motor common carrier providing transportation services to the shipping public under a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission. It apparently made a private agreement with Sunshine Mills, Inc. (hereafter Sunshine), a shipper of dog food and related items, for a specific charge different from what was contained in the published tariff. Sunshine paid the lesser agreed upon rate and upon being billed the published tariff charge, refused to pay. Thereupon, Rebel sued Sunshine in the General Sessions Court of Shelby County, Tennessee for $6,007.60 representing the difference between the filed tariff rate and the rate actually paid. Sunshine offered no defense to the action and judgment for that amount plus pre-judgment interest was rendered in that court. Within the statutory ten day time limit Sunshine filed an appeal to the Circuit Court of Tennessee For The Thirtieth Judicial District at Memphis where it asked the court to stay the proceeding and refer to the Interstate Commerce Commission " . . . the issues of Rebel's applicable tariff rates and the reasonableness of its rate practices . . . for an initial determination of these issues pursuant to Ex Parte MC-177." In its Memorandum of Law in support of said Motion it asked the court to specifically refer three enumerated issues as follows:

> "1. Defendant Sunshine respectfully requests that this Court refer to the ICC the following issues: (1) The applicability of tariff

> rates; (2) whether the collection of the alleged undercharges constitutes an unreasonable practice; and (3) if an agreed upon rate is found to exist (as Sunshine believes the facts will show) and shipments were made under those agreed upon rates, whether the carrier should be permitted to collect a different amount."

The motion was granted and the cause referred to the Interstate Commerce Commission.

The case of *Sunshine Mills, Inc. v. Rebel Motor Freight, Inc.*, MC-C-30140 was handled before the Commission under its modified procedure resulting in a decision served July 31, 1989 in which the Commission relying upon its *Negotiated Rates* policy concluded that it would be an unreasonable practice to require Sunshine to pay undercharges for the shipments handled by Rebel pursuant to their negotiated agreement. There was no motion of the reasonableness of any rate nor was any evidence submitted to the Commission concerning same. The Commission's decision was appealed to the United States Court of Appeals for the Sixth Circuit on a Petition for Review in docket 89-3886, *Rebel Motor Freight, Inc. v. Interstate Commerce Commission et al.* That matter was held in abeyance pending this Court's decision in the *Maislin* case. After *Maislin* was decided, the appeal was then reinstated. Rebel relying upon this Court's decision in *Maislin* argued that the ICC's decision was contrary to law and should be declared null and void. The Interstate Commerce Commission waived its right to file a brief in this cause agreeing that the *Maislin*-decision controlled the unreasonable practice issue presented but stated that to the extent that an issue of the reasonableness of the rate remained, it should be remanded to it for consideration.

Intervenor Sunshine took the position that only the unreasonable practice issue was decided and since there had been no determination by the Commission of the reasonableness of the rates claimed that footnote 10 in the *Maislin* decision "requires now a reference to the ICC on unreasonable-

ness" and asked that it be re-referred to the ICC. Sunshine said that it would have been futile to have argued the reasonableness of the rates issue before the ICC since it was deciding cases under its *Negotiated Rates* policy on the unreasonable practice issue only. It then represented to the court that it had investigated the Memphis-Texas rates during the period October-December, 1983 and was "prepared to prove to the Interstate Commerce Commission by fact and expert evidence on each of the *Westinghouse* issues that the class rates asserted by Petitioner are basically and inherently unreasonable." It therefore sought remand to the ICC for a determination of the reasonableness of the rates, an issue it arguably did not have referred to the ICC in the first place, or, if it did, clearly waived when it did not present evidence on it to the Commission.

Rebel, in reply, responded that both the Interstate Commerce Act and Supreme Court precedent compelled a decision that this matter not be re-referred to the Interstate Commerce Commission on the reasonableness of the rate issue basically claiming that the scheme of the Interstate Commerce Act required first the payment of the tariff rate, and then, if the shipper believed the tariff rate to be unreasonable, it could seek reparations. Additionally, Rebel argued to grant Sunshine's motion to re-refer the case to the ICC would thwart the purpose of the filed rate doctrine; that the burden was on Sunshine to support a further stay in this cause which burden it had not sustained; that Sunshine had wholly failed to present any evidence as set forth in §10701(e) of the Interstate Commerce Act to establish even an inference that the rates sought were unreasonable; that Sunshine should be equitably estopped from asserting a matter it failed to pursue before the ICC; that Sunshine should not be allowed to change its defense on the appellate level; and that it would be grossly unfair and inequitable to require Rebel to recommence the litigation after having already waited over four years for its day in court.

The Sixth Circuit Court of Appeals believing there to be a conflict between "the rigidity of the filed rate doctrine

and the requirement that the rates be 'reasonable'" first determined that the ICC's decision could not be affirmed because of *Maislin* and its previous decision in *Orr v. Interstate Commerce Commission*, 912 F.2d 119 (6th Cir. 1990). It then pointed out the caveat in footnote 10 in *Maislin* stating that "The issue of the reasonableness of the tariff is open for exploration on remand", and, also the dissent of Justice Stevens to the effect that this Court's decision in *T.I.M.E. v. United States* "was greatly limited by this Court's subsequent decision in *Hewett-Robbins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88-89 [1962], and what remained of it was thereafter unambiguously repudiated by Congress." It further distinguished its decision from the post-*Maislin* decision of the Third Circuit Court of Appeals in the case of *Branch Motor Express Co. v. Caloric Corp.*, No. 89-1130, slip. op. (3rd Cir., August 14, 1990) and reversed the ICC decision but remanded it for a determination of the reasonableness of the rate.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Ruling Below Conflicts With Decisions Of This Court

The essence of the question before the Court is whether a shipper may refuse to pay the filed tariff rate claiming it to be unreasonable. Petitioner respectfully submits that the shipper may not refuse to pay the filed tariff rate, otherwise it would be in violation of §10761(a) of the Act. It has always been the position of this Court that a common carrier must charge and receive in payment for its services only the filed tariff rate. If the shipper believes that rate is unreasonable, then it has been provided redress under the Act in the form of reparations, that is, damages to the extent that it has paid a charge that is subsequently determined by the ICC to have been unreasonable.

In 1907 this Court first addressed the power of the ICC to determine unreasonable rate cases and to award reparations in appropriate circumstances in the case of *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907) where it said:

> ". . . a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the Act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alternation of an established schedule, because the rates fixed therein are unreasonable, ..." (204 U.S. at 444).

That case emphasized that a shipper must pay the legal, that is, filed rate and that the Act to Regulate Commerce embodied the common law right to be charged only a reasonable rate. The Act provided the only redress for a violation of that duty, and that redress was by way of reparations only.

On January 9, 1912 in the case of *Clarence D. Robinson v. Baltimore & Ohio Railroad Co*, 222 U.S. 506, 32 S.Ct. 114, 56 L.Ed. 288, this Court made absolutely clear its support for the reparations procedures as follows:

> "The act [specific citations omitted], whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, that act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect, invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in any wise violative of the prohibi-

tions of the act, and, if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorize the Commission to direct the carrier to desist from any violation found to exist, *and to make reparation for any injury found to have been done.* Provision was also made for the enforcement of the order for reparation by an action in the circuit court of the United States if the carrier failed to comply with it.

Thus, for the purpose of preventing unreasonable charges, unjust discriminations, and undue preferences, a system of establishing, maintaining, and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any nonconformity to those standards by an appropriate change in schedules *and by due reparation to injured persons.*

When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that

> a rate established in the mode prescribed should be deemed the legal rate, and *obligatory alike upon carrier and shipper until changed in the manner provided*, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure." (32 S.Ct. 115, emphasis ours).

Within the next year this Court had another case before it dealing with the proper redress for charging unreasonable rates to a shipper by way of reparations. In the case of *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184, 33 S.Ct. 893, 57 L.Ed. 1446 (1913), this Court said:

> "If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparations." (33 S.Ct. 896).

This was the law in 1913 and is still the law in 1991. This case has never been overruled or diminished in any shape, form or fashion by this Court.

Subsequently in the case of *Davis v. Portland Seed Co. et al*, 264 U.S. 403, 44 S.Ct. 380, 68 L.Ed. 762 (1924), the court noted that for ten years the ICC had required proof of financial loss as a requisite to a reparations procedure and that Congress had not shown its disapproval of that interpretation. The court went on to state:

> "The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified." (24 S.Ct. 384-385).

This Court elaborated on the reparation procedure in 1932 in the case of *Arizona Grocery Co. v. Atchison T. &*

S.F.R. Co., 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 where it said:

> 'In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates; that is, those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate--it was lawful only if it was reasonable. Under section 6, the shipper was bound to pay the legal rate; but, if he could show that it was unreasonable, he might recover reparation.' (284 U.S. at 384, 52 S.Ct. at 184).

Approximately ten years later this Court was faced with a shipper trying to stay an action in a lower court who sought to first have the ICC determine the reasonableness of the rate before court action was commenced. Sunshine is trying to do exactly the same thing in the instant case. In the case of *Crancer et al v. Lowden et al*, 315 U.S. 631, 62 S.Ct. 763, 86 L.Ed. 1077 (1942) in upholding the district and circuit courts' decisions not to stay and compelling the shipper to pay the full tariff charges this Court said:

> "We brought the case here because of the claim that the courts below sustained the jurisdiction of the District Court although the matter concerned called for the exercise of the

administrative discretion of the Interstate Commerce Commission, under the established rule first announced in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075, as explained in Great N. Ry. v. Merchants' Elev. Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943." (62 S.Ct. 764).

* * *

"Second, petitioners contend that the District Court erred in denying their motion to stay proceedings in this case pending action by the I.C.C. in the second proceeding before the Commission."

* * *

"In their newly instituted proceeding, petitioners did not resurrect that dispute but confined themselves to the contention that the rates on pipe fittings were unreasonable as applied to their pipe thread protecting rings. The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them. 'Until changed, tariffs bind both carriers and shippers with the force of law. Under Section 6 of the Interstate Commerce Act [49 U.S.C.A. § 6] the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property. That section forbids the carrier from giving a voluntary rebate in any shape or form. This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less that the tariff rate. It is equally important to aid the efforts of the carrier in collecting published charges in full.

> Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.' *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520, 521, 59 S.Ct. 612, 614, 83 L.Ed. 953. Nothing involved in the pending administrative proceedings before the Interstate Commerce Commission was essential to the determination of the issue in this suit [which issue was the collection of the filed tariff rate.]" (62 S.Ct. 765).

These well established precedents requiring the shipper to pay only the filed tariff rate and thereafter to seek reparations if it thought the rate was unreasonable, were clearly in place when this Court was faced with the claim by a shipper of the unlawfulness of charges for past shipments by a motor common carrier. In 1959 this Court decided the case of *T.I.M.E. v. United States*, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952. Prior to that time the ICC had set up a procedure whereby shippers such as Sunshine could petition the ICC for an order waiving undercharges. This procedure was challenged in the *T.I.M.E.* case. In that case a motor common carrier had sued the United States as shipper, to collect freight charges. The government defended on the grounds that the rates upon which the carrier relied were unjust and unreasonable. The United States Supreme Court there held:

> "The structure and history of Part II (the Motor Carrier Act), however, lead to the conclusion that here, as in the Federal Power Act, *Congress did not intend* to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, *or to enable them to assert 'unreasonableness' as a defense in carrier suits to recover applicable tariff rates.*" (359 U.S. 470, italics ours).

It was asserted in *T.I.M.E.* that a defense existed by virtue of the language in former section 216(b) of the Act [the predecessor to present section 10701(a) upon which Sunshine re-

lies] requiring that a carrier's rates be reasonable. The court in *T.I.M.E.* held that the statutory duty to establish and observe reasonable rates created only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right" (359 U.S. at 469). Then, as now, the general requirement imposed upon common carriers by section 10701(a) to maintain reasonable rates, provides shippers no defense for a violation of that duty. The holding in *T.I.M.E.* left the purchasers of motor carrier freight services without any remedy whatever with respect to unreasonable rates on past motor carrier shipments.

In 1965, the 69th Congress created for the first time a limited remedy regarding the failure of a carrier to maintain just and reasonable rates. Pub.L. 89-170, 79 Stat. 651, amended then section 204(a) of the Interstate Commerce Act to provide a cause of action against motor carriers for recovery of "reparations" defined as "damages resulting from charges for transportation services to the extent that the Commission upon complaint made as provided in section 216(e) of this part . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." 1965 U.S. Code Cong. and Adm.News at 708, 712.

The legislative history indicates that Congress' response to *T.I.M.E.* was limited. Section 204a of the Act did not disturb the holding in *T.I.M.E.* except to allow the commencement of a reparations action for damages. Here, we have no countersuit claiming reparations. Nor could we because Sunshine has never paid the tariff rate.

The 1965 law is very specific in providing a remedy only where a shipper commences a proceeding to recover reparations. The narrow reparations remedy cannot be read in light of *T.I.M.E., supra*, as providing a defense to an action to collect tariff charges. Sunshine's suggestion seems to be that motor rates must be proven reasonable before they can be collected. This is incorrect. As noted by this Court on numerous occasions, a carrier's tariff rates are presumed

reasonable. *Maislin, supra* (1990); *T.I.M.E., supra* (1959); *Louisville & N.R. Co v. Maxwell*, 237 U.S. 94 (1915); *Arizona Grocery v. Atchison, T & S.F.R.*, 284 U.S. 370, 384 (1932).

With the amendment to the Act in 1965 shippers by motor common carrier were given a limited remedy of reparations which one circuit court has characterized as follows:

> "It necessarily follows that (that remedy) provides the sole and exclusive remedy for excessive charges." *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082, 1084 (5th Cir. 1974).

Another United States Court of Appeals has arrived at a similar conclusion based upon similar circumstances. It the case of *United States of America v. Associated Transport, Inc. et al*, 505 F.2d 366 (D.C. Cir. 1974) the court discussed the 1965 amendment to the Motor Carrier Act as follows:

> "And although the Act declares excessive rates to be unlawful, Congress has now provided a procedure designed specifically for rectification of such excesses. By virtue of the 1965 amendment, a shipper may challenge a carrier's rates before the Commission and, if successful, may recover reparations in court. The frame and preamendment history of the Motor Carrier Act, as *T.I.M.E.* explains, evince a congressional intent to secure the reasonableness of rates through the administrative processes it prescribes, and to exclude liability of motor carriers to shippers on account of excessive rate-charging in the past. By the 1965 amendment, Congress has relented somewhat, *but only to the extent of admitting the current reparations procedure*." (Italics ours, 505 F.2d 368-369).

In more recent years this Court has made statements

indicating it still relies upon reparations as the proper method for shippers to receive refunds for overpayment of unreasonable tariff charges. In 1982 in the case of *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 103 S.Ct. 514, 74 L.Ed.2d 311, the Court made the following statement concerning reparations:

> "[W]here there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control pending decision by the Commission, since under the Act, the shipper may receive reparations for overpayment while the carrier can never be made whole after underpayment." (103 S.Ct. 521).

And finally in the recently decided *Maislin* decision on the same page where this Court expresses the important caveat that the filed rate must be reasonable, said:

> "The filed rate doctrine, therefore, follows from the requirement that only filed rates be collected, as commanded by §§10761 and 10762, the requirement that rates not be discriminatory, see 49 U.S.C. §10761, and the requirement of §10701 that carriers adopt reasonable rates and practices. As we explained in *Arizona Grocery, supra*, although the filed rate is the *legal* rate, the Act
>
> > 'did not abrogate, but [rather] expressly affirmed, the common-law duty to charge no more than a reasonable rate . . . . In other words, the legal rate was not made by the statute a lawful rate--it was lawful only if it was reasonable. Under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparations.'" (110 S.Ct. 2767).

The Court even referred to another case involving reparations in its footnote 11 being that of *Adams v. Mills*, 286 U.S. 397, 412, 52 S.Ct. 589, 593, L.Ed. 1184 (1932).

Numerous courts (including the court below), the Interstate Commerce Commission, and all shippers are currently taking the position that because of the caveat together with footnote 10 in the *Maislin* decision the proper course of action in cases of this type are to re-refer the issue of rate reasonableness to the Interstate Commerce Commission. In short, they reason that footnote 10 effectively overruled this long line of precedential decisions, as well as, the Interstate Commerce Act itself, concerning reparations. A list of cases known to petitioner in which a court or the Commission has taken the view that the Commission may determine the reasonableness of a rate even though the shipper has not paid same will be appended hereto as part of Appendix C. The Appendix will also list cases taking the opposite view.

Rebel respectfully submits that these parties are both misconstruing what this Court was saying in *Maislin*, as well as the Interstate Commerce Act. In addition, they are totally ignoring the precedents established by this Court in the cases cited heretofore. Both the Act and *Maislin* make it abundantly clear that it is the duty of carriers to establish just and reasonable rates under standards promulgated by the Interstate Commerce Commission. The shipping public, competing carriers and the Commission have the right to prevent those rates from going into effect by objecting to them and causing them to be investigated fully by the Commission before they become effective. Once they have become effective, however, they are binding on all parties. They are required to be paid in advance or only upon credit terms as promulgated by the Interstate Commerce Commission. See 49 C.F.R. §1320. If, after having paid them, the shipper believes that they are unreasonable, it has a second opportunity to contest their validity by initiating a complaint proceeding before the Interstate Commerce Commission under §11705(b)(3); and, if successful, can receive a refund of all amounts over what has been determined to be the reasonable rate, plus interest. In

this manner all shippers are treated alike and the purposes of the Act are fulfilled. Nothing in *Maislin* is to the contrary. It is respectfully submitted that the recent decisions by numerous courts including the United States Sixth Circuit Court of Appeals is a misapplication of this law. They are contrary to both the spirit and the exacting requirements of the "filed rate doctrine" (§10761(a)) of the Act. This Court is requested to grant certiorari to correct this error.

B. The Federal Courts Are Unalterably Split On the Proper Construction Of The Interstate Commerce Act

The United States Court of Appeals for the Sixth Circuit stated that:

> "Rebel's argument, which emphasizes that reparations provides for the only remedy, does not provide an opportunity for the ICC to address the reasonableness of rates[1]. As a carrier subject to the jurisdiction of the Interstate Commerce Commission, Rebel had an obligation under Section 10701 to keep its rates 'reasonable'. A remand to the ICC effectuates this purpose."

To be contrasted with this is the decision of the United States Court of Appeals for the Third Circuit where in the case of *Branch Motor Express Co. v. Caloric Corp.*, No. 89-1130, slip.op. (3rd Cir. August 14, 1990) in an almost identical fact and legal situation it refused to remand to the ICC the rate reasonableness issue because the shipper "never supplied any support for its proposition that [the carrier's] rates were unreasonable." Thus *Branch Motor* did not even mention the requirement to pay the rate first and seek reparations thereafter. It merely said that the case had already been before the ICC, that the shipper had the chance to pre-

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[1]The ICC addresses the rate reasonableness issue in a reparation case; indeed, that is the only issue to be decided.

sent its entire case the first time around and it was not going to allow it a second bite at the apple particularly in view of the fact that it had presented no evidence to support its unreasonableness claim[2].

The Sixth Circuit stated basically that it agreed with the Third Circuit that *Maislin* did not require a remand in every case where unreasonableness of rates was alleged. It preferred to make its decision upon the same basis as did the Third Circuit of whether the shipper was prepared to prove its unreasonableness charge.[3] Noteworthy, however, is the fact that the Sixth Circuit totally overruled the *T.I.M.E.* case and stated that "Sunshine is not required to pursue reparations as its sole remedy."

On the other hand, the Fifth Circuit Court of Appeals in the case of *In the Matter of Caravan Refrigerated Cargo, Inc., Debtor. Supreme Beef Processors, Inc. v. Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S.Ct. 83, said:

> "Thus, our precedent declares that a carrier is entitled to enforce the filed rates under the filed tariff doctrine and to seek payment of undercharges in the district court even while the reasonableness of the tariffs is challenged before the Commission. The rule is necessary

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[2]Compare this to the opposite result reached by the Sixth Circuit on virtually identical facts as quoted in the following footnote.

[3] In the instant proceedings Sunshine did not present one scintilla of evidence of rate unreasonableness either to the Circuit Court of Tennessee, the ICC or the Sixth Circuit. Rather in its Intervenor's Initial Brief before the Sixth Circuit it merely stated that it ". . . has investigated the Memphis-Texas rates during the period October-December, 1983. It is prepared to prove to the Interstate Commerce Commission by fact and expert evidence on each of the *Westinghouse* issues that the class rates asserted by Petitioner are basically and inherently unreasonable." The reference to the case mentioned is to the case of *Westinghouse Electric Corp. v. U.S.*, 388 F.Supp. 1309, a reparation case.

> to protect the filed tariff doctrine and its underlying policy of ensuring reasonable and non-discriminatory rates.
>
> Our decision here is an application of the same rule. A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the commission. Any other decision would constitute legislation on our part; it would create an exception that swallows the doctrine and thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact." (864 F.2d 391-392).

That case followed in line with another decision from the same Circuit being *Southern Pacific Trans. Co. v. San Antonio, TX*, 748 F.2d 266 in which it relied upon this Court's decision in *Pennsylvania Railroad, supra*, *Arizona Grocery, supra*, and *Lowden v. Simonds-Shields-Lonsdale Grain*, 306 U.S. 516, 59 S.Ct. 612, 83 L.Ed. 953 (1939), and said:

> "The Interstate Commerce Act, thus entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the I.C.C. The carrier, on the other hand, receives assurance that payment will not be delayed pending review; but the carrier must be prepared to reimburse amounts later found to be unreasonable." (748 F.2d 274).[4]

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[4]The ICC was a party litigant in this case. It there made exactly the same argument to the court as Rebel does in this petition, a position which it now apparently opposes before the Sixth Circuit in the instant proceeding. In the *San Antonio* case before the Fifth Circuit it agreed with the carrier in condemning the district court's decision to stay pending the ICC's determination of the rate reasonableness and said:

> "The district court erred, however, in staying execution of its judgment pending disposition of San Antonio's rate reasonableness

Petitioner is aware of another appeal pending in the Fifth Circuit being cause No. 91-1320, *Advance-United Expressways, Inc. v. Eastman Kodak Co.* involving the same identical question. In that case the United States District Court for the Northern District of Texas, Dallas Division granted summary judgment to the carrier and there said:

> "If Kodak seeks to raise as a defense that the filed rates themselves were unreasonable, it may do so before the ICC, but only after payment of the undercharges sued upon in this court. *Caravan Refrigerated Cargo, Inc.*, 864 F.2d at 391-92. As Justice Brennan wrote in *Maislin*, '[i]f strict adherence to §§10761 and 10762 as embodied in the filed rate doctrine has become an anachronism . . . , it is the responsibility of Congress to modify or eliminate these sections.' *Maislin*, 110 S.Ct. at 2771."

The United States Court of Appeals for the First Circuit seems to have led the way of those courts taking the position that a re-referral to the Interstate Commerce Commission without paying the filed tariff rate is the appropriate response to *Maislin*. In the case of *Delta Traffic Service, Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990), that court said:

> claims before the Interstate Commerce Commission. The effect is to prevent the railroads from collecting the concededly applicable tariff rate pending final disposition by the Commission on San Antonio's rate reasonableness claims.
>
> * * *
>
> The district court's stay, rather than preserving the ICC's primary jurisdiction, potentially frustrates that jurisdiction, by creating an incentive for others to withhold payment of tariff rates.
>
> * * *
>
> The court erred in invoking the Commission's primary jurisdiction because, if anything, the court's stay frustrates rather than aids that jurisdiction, by effectively sanctioning San Antonio's refusal to pay the tariff rate." (Brief of ICC).

> "Because shippers may assert the unreasonableness of a rate as grounds for recovery in a reparations suit, courts ordinarily have permitted shippers to assert this same grounds as a *defense* in a *carrier's suit* to collect the filed ("legal") rate. [Citations omitted]. In such cases, the shipper may 'ask for a stay of the court proceedings and then ask the Commission to declare the [higher rate] . . . unreasonable.'"
>
> * * *
>
> "This legal regimen tends (1) to prevent carriers from favoring particular shippers by charging a lower-than-filed-tariff rate, (2) to protect shippers from having to pay a higher-than-reasonable rate, and (3) to permit the relevant expert body, the ICC, to make the relevant expert determinations." (902 F.2d 104-105).

Petitioner would observe that the ICC as the expert body has every opportunity to determine the reasonableness of the rate in a reparations case, a fact that the Sixth Circuit seems to overlook in the case sought to be reviewed herein. Furthermore, if Congress had sought to protect shippers from having to pay a "higher-than-reasonable" rate by allowing them a defense of unreasonableness, there would be no need to provide for a reparations procedure in the first place. The First Circuit recognized that it was diametrically opposed to the Fifth Circuit's position in *Supreme Beef* but for reasons stated in its opinion concluded that "We do not think the Supreme Court cases support the "no referral" rule adopted by the Fifth Circuit in *Supreme Beef*." The First Circuit then, like the Sixth, threw out this Court's decision in *T.I.M.E.* because of the 1965 amendment allowing reparations. The First Circuit concluded that:

> "It follows that motor shippers, like rail shippers, should be able to assert the unreasonableness of past charges as a *defense* in a carrier's suit for undercharges." (902 F.2d at 106).

A reading of the *Transtop* case shows that the First Circuit relies almost entirely upon this Court's decision in the case of *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956), where the Court of Claims had refused to refer to the ICC whether certain items were incendiary bombs and also whether the higher rate for incendiary bombs was reasonable. However, it should be recognized by the Court that the *Western Pacific* case was a Tucker Act case. Under the Tucker Act (28 U.S.C. §1491), the Court of Claims is specifically given "the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." In short, the exact question presented in this case under the Interstate Commerce Act was not the same situation presented to this Court in the *Western Pacific* case under the Tucker Act. Furthermore, the *Western Pacific* case involved the United States Government as a shipper and the Interstate Commerce Act accords the government different treatment for offsetting overcharges it may have paid than it does commercial shippers such as is involved in this instant litigation.

In the recent case of *James G. Duffy, Trustee for Canny Trucking Co., Inc. v. BMC Industries, Inc. d/b/a Buckbee Mears Cortland Co.*, No. 1517, the United States Court of Appeals for the Second Circuit on June 28, 1991 had before it an interlocutory appeal from the District Court for the Northern District of New York which had stayed the proceeding and referred the issue of rate reasonableness to the Interstate Commerce Commission. The Second Circuit recognized that there was "disagreement among the circuits as to whether a shipper may contest the reasonableness of a filed rate prior to making payment according to its terms." In so stating it noted the cases of *Delta v. Transtop, supra, Supreme Beef v. Yaquinta, supra, In Re Sharm Express, infra,* as well as, *Crancer v. Lowden, supra, U.S. v. Western Pac., supra, and T.I.M.E., supra*. The Court noted that *Crancer* "casts considerable doubt on the authority of the district court to grant a stay and refer tariff challenges to the Commission prior to payment." It acknowledged the First Circuit's interpretation of *Western Pacific* but noted that since the First Circuit made

no mention of *Crancer* and because *Western Pacific* involved the United States as a shipper it was perhaps accorded an exception to the filed rate doctrine. In discussing *T.I.M.E.* and that it had arguably been legislatively overruled, since there was no mention of *Crancer* in that decision, it left the court "somewhat uncertain as to whether an unreasonable rate defense may generally be asserted by a private shipper prior to full payment." Based generally upon other grounds it held that the district court had not abused its discretion in referring the matter to the ICC but it is readily apparent from the Second Circuit's decision that the issue presented here by this Petition is clearly warranted.

A typical Federal District Court decision following the lead of *Transtop, supra*, is that of *In Re Sharm Express, Inc. Debtor. Edward Bergquist, Trustee v. 7/24 Sales, Inc.*, 122 B.R. 999 (1990) where the District Court for the District of Minnesota, Fourth Division, overruled the bankruptcy court which had refused to stay the cause and had granted summary judgment in favor of the carrier. In its Conclusions of Law the bankruptcy court had said:

> "That the issue of the unreasonableness of Sharm Express, Inc.'s filed tariff rates is not a defense to Plaintiff's undercharge action. Instead, rate reasonableness is a separate cause of action (a reparation action) which the Defendant has failed to utilize." (USBC, D MN).

On appeal and in reversing that decision the district court said:

> "The Court agrees with the First Circuit that allowing unreasonableness to be raised as a defense to a collection action does not undermine the purposes underlying the Interstate Commerce Act nor in any way involve courts in rate making properly assigned to the ICC."

Thus, in this one case, the Court may see the divergent

opinions of two judges looking at the same facts and the same law.

And yet, a judge in the District Court for the Fourth Judicial District of the County of Hennepin, State of Minnesota dealing with the same issue agrees with the bankruptcy court. In the case of *Atlantis Express, Inc. v. N & M Nationwide, Inc.*, 90-1815 and *The Bankruptcy Estate of United Shipping, Inc. v. National Automotive and Rubber Marketing, Inc.*, No. 90-1814 (November 23, 1990), the district judge said that:

> "The plaintiff has asserted that rate unreasonableness is not a defense to the underlying action for filed rate undercharges and this Court is inclined to agree. In order to dispute the reasonableness of the filed rate, the defendant must pursue a separate reparations action. This remedy was provided in 1965 after the T.I.M.E. decision left shipper without recourse for paying unjust rates. The reparations action can be brought only after the defendant has paid the undercharges."

And a Federal District Court for the Northern District of Texas, Dallas Division agrees. Judge Fish in the case of *Advance-United Expressways, Inc. v. Duro Metal Manufacturing Co.*, Civil No. CA3-89-2442-G said:

> "The Maislin Court, as well as the Fifth Circuit in Matter of Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989), have agreed that the ICA permits no deviation from the filed rates. If Duro Metal seeks to raise as a defense that the filed rates themselves were unreasonable, it may do so before the ICC, but only after payment of the undercharges sued upon in this court."

It is apparent that the courts disagree as to the proper interpretation and application of the rate reasonableness issue as

a defense to a carrier's suit seeking to secure judgment for the filed rate. This Court should grant certiorari to decide this issue.

C. The Act Does Not Address What Proof Is Required To Raise An Issue of Rate Reasonableness

The courts likewise differ as to what proof is required in order to have a court stay its proceedings and refer the issue of rate reasonableness to the ICC. This is because the matter was not addressed by Congress in the Interstate Commerce Act. Many of the courts recognize this dilemma. Bankruptcy Judge James A. Pusateri, judge of the Bankruptcy Court for the District of Kansas, recently noted that ". . . while it may seem preposterous that all the Shipper must do is to merely state that the Carrier's rate is unreasonable to be granted referral to the ICC, anything more, such as the standards set forth under 49 U.S.C. §10701(e) of the Interstate Commerce Act, would begin to infringe on the primary jurisdiction of the ICC." *In Re: American Freight System, Inc.,*, 88-41050-11; *American Freight System, Inc. v. U.S. National Resources, Inc., a/k/a Friedrich Air Conditioning*, Adv. No. 90-7248 (April 16, 1991).

The Sixth Circuit Court of Appeals in the instant proceeding seems to agree. See previous argument and particularly footnote 3, *ante*, where the only proof submitted to the court was an unsupported statement in a reply brief that the shipper was prepared to prove rate unreasonableness.

To be contrasted to this is the decision by the Third Circuit Court of Appeals in *Branch Motor Express, supra*, where it refused to remand and allow the shipper a second bite out of the apple because it had not presented any evidence to support its rate unreasonableness claim.

The *Branch* court seems to represent one end of the spectrum where it said:

> "Caloric's mere mention of rate unreasonableness, entirely unsupported even now, is not sufficient to give it a second bit at the apple. 'We remind counsel that phrasing an issue as a matter of tariff construction or as a question of reasonableness does not determine the issue of primary jurisdiction.... As the Supreme Court noted "[t]o hold otherwise would would make the doctrine of primary jurisdiction an abstraction to be called into operation at the whim of the pleader."' Delta Traffic Service v. Occidental Chemical Co., 846 F.2d 911 (3d Cir. 1988) (quoting from United States v. Western Pacific R. Co., 352 U.S. 59, 69 (1956))."

Rebel then asks this Court that if it believes that a shipper may raise the unreasonable rate issue as a defense to its action seeking to enforce the filed tariff rate, what quantum of proof is necessary to satisfy a trial court that a genuine issue of rate reasonableness is present so as to require it to stay its proceedings and refer the issue to the Interstate Commerce Commission? This Court has said that it may not be done upon the whim of the pleader. Clearly, there is no evidence in the case Rebel seeks to have reviewed here other than the "whim of the pleader" making an unsupported allegation of what it intends to prove before the Commission. From the record it appears that all it is going to attempt to prove is that the filed tariff rate is higher than the negotiated and now rejected rate. Clearly that is not a statutory basis for unreasonableness.

It is respectfully submitted that the very fact that Congress did not give any standards or direction in the Act itself to those entrusted with enforcing it, should further enhance Rebel's argument that a defense of rate unreasonableness should not be allowed in the first place. If the shipper pays the filed tariff rate, and thereafter institutes a reparations proceeding, it has no such burden of telling a court what it hopes to prove before the ICC. It simply goes to the ICC with its complaint, presents what proof it has and allows the

Commission to decide the issue based upon all the evidence.

CONCLUSION

The issue presented in this case has already been answered in the case of *T.I.M.E. v. United States, supra*. However, since Congress did modify some of the holding in *T.I.M.E.* by legislative enactment in 1965, and since the caveat and footnote of this Court in its recent *Maislin* decision seem to emphasize the reasonableness of the rate rather than how one must go about bringing that issue before the Interstate Commerce Commission for determination, the *Maislin* decision rather than settling the issues presented in cases of this type, has allowed them to simmer and boil without resolution. There are literally hundreds of these cases still clogging the court system winding their way back to this Court for final resolution. It is believed that the only way to reasonably lay this issue to rest is to have this Court revisit the *Maislin* case and explain clearly and explicitly that although an issue of rate reasonableness may be ultimately involved, the only statutory framework by which a shipper may raise that issue is to pay the filed tariff rate and then institute a proceeding before the Interstate Commerce Commission for reparations if it considers itself to have been damaged thereby. Petitioner therefore requests this Court to grant this writ for certiorari and that same be issued to the United States Court of Appeals for the Sixth Circuit to the end that its decision be reversed and that of the Interstate Commerce Commission be held null, void and of no effect because there is no issue properly before it concerning the reasonableness of the rate at this time.

Respectfully submitted,

James N. Clay, III
222 E. Mallory Avenue
Memphis, TN 38109
Counsel of Record
for Petitioner

APPENDIX

APPENDIX A

No. 89-3886

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REBEL MOTOR FREIGHT, INC.	:	
Petitioner,	:	
v.	:	**ON PETITION FOR REVIEW OF A DECISION OF THE INTERSTATE COMMERCE COMMISSION**
INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA,	:	
Respondents,	:	NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
SUNSHINE MILLS, INC.	:	Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be prominently displayed if this decision is reproduced.
Intervenor.	:	

Filed: May, 28, 1991

BEFORE: **JONES** and **SUHRHEINRICH**, Circuit Judges; and **JOINER,***, Senior District Judge.

PER CURIAM. Carriers operating in interstate commerce are required to file their rates with the Interstate Commerce Commission (ICC). 49 U.S.C. §10762(a)(1988). Furthermore, under the filed rate doctrine, carriers are only

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* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

permitted to charge the rate on file with the ICC:

> [A] carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff[.]

49 U.S.C. § 10761(a)(1988) (emphasis added). The clear duty of carriers to charge only rates on file is qualified in the Interstate Commerce Act by the requirement that rates "must be reasonable." 49 U.S.C. § 10701(a)(1988).

The case at bar is addressed to the conflict between the rigidity of the filed rate doctrine and the requirement that rates be "reasonable." Petitioner Rebel Motor Freight ("Rebel") was an authorized interstate carrier and filed its rates with the ICC. Intervenor Sunshine Mills manufactures dog food. In early 1983, Rebel agreed to transport Sunshine's products from Mississippi to Texas at a rate slightly below the filed rate. Sunshine was not aware that the billing rate was lower than the rate on file with the ICC. Rebel apparently charged below the rate on file in order to maintain a competitive edge over business rivals. Between October 6 and December 30, 1983, Rebel handled nine truckload shipments, and Sunshine paid the billed amounts.

Sunshine paid $6,007.60 less for the nine shipments than the Rebel rate on file with the ICC. Several years later, Rebel attempted to collect the $6,007.60 in "undercharges" in the face of liquidation. At this time Sunshine learned that the rate paid in 1983 was not published in a tariff.

Rebel filed suit in the General Sessions Court of Shelby County, Tennessee seeking to recover the $6,007.60 in transportation charges relating to the nine shipments in 1983.

Following judgment for Rebel, Sunshine appealed to the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis. On August 4, 1988, the Circuit Court stayed the proceedings and granted Sunshine's motion to refer the matter to the ICC to determine "whether the undercharges sought to be collected by plaintiff under all circumstances would be an unreasonable practice." J. App. at 17 (Order). On December 20, 1988, Sunshine submitted a brief to the ICC arguing that Rebel's action in attempting to collect the undercharges was an unreasonable practice under 49 U.S.C. §10701(a), which states that "[a] rate . . . must be reasonable."

Before the ICC, Rebel moved for dismissal on grounds that (1) the filed rate doctrine did not invite interpretations as to "reasonableness", and (2) under section 10761, Rebel had no authority to charge less than the rate specified in the tariff; therefore, the 1983 written rate agreement with Sunshine was void because it circumvented section 10761.

The ICC rejected Rebel's argument because of an ICC policy--known as "the Negotiated Rates[1] policy"--which provided that the filed rate doctrine does not necessarily bar defenses against a carrier's undercharge claim. J.App. at 54 (ICC Decision). The purpose of the Negotiated Rates policy was to "temper the harsh effects of the filed rate doctrine when it can be shown that the shipper and carrier negotiated and agreed upon a rate that was not published in a tariff." Id at 54. Because Sunshine and Rebel entered into a written agreement providing for a rate, the ICC concluded that it would be unreasonable to require Sunshine to pay undercharges now for the shipments handled by Rebel pursuant to their negotiated agreement. Id at 55.

On September 25, 1989, Rebel filed a Petition for Re-

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[1] The policy originated in a 1986 case in an attempt to temper the harshness of the filed rate doctrine. The ICC concluded that, in future referrals, the ICC would "decide if the collection of undercharges would be a reasonable practice." NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99, 100 (1986) (Negotiated Rates I).

view requesting this court to review the decision of the ICC. The case was held in abeyance pending our decision in Orr v. Interstate Commerce Commission, 912 F.2d 119 (6th Cir. 1990). In Orr, this court followed the Supreme Court's decision in Maislin Industries, U.S., v. Primary Steel, Inc., 110 S.Ct. 2759 (1990). In both Orr and Maislin, as in the instant case, a carrier attempted to recover freight undercharges from a shipper. In order to strengthen the filed rate doctrine, the Court in Maislin held that the ICC's Negotiated Rates policy was "flatly inconsistent" with the mandatory duty of carriers, as expressed in section 109761, to charge only rates properly filed. 110 S.Ct. at 2768.

In Orr, this court applied Maislin and "rejected the ICC's determination that collection of undercharges based on filed rates, after lower unfiled rates had been negotiated, constituted an 'unreasonable practice.'" Orr, 912 F.2d at 122. Orr remanded for a determination of the reasonableness of the tariff rates. Id.

Maislin and Orr clearly require reversal of the ICC's decision below. The only dispute is whether the case should be remanded back to enable the ICC to determine if the rate on file was reasonable. In this regard, we note that Maislin emphasized the statutory requirement that filed rates be "reasonable." Maislin, 110 S.Ct. at 2767 ("The filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable.") A footnote in Maislin also suggests a remand may be appropriate if the reasonableness issue has not yet been addressed:

> The ICC did not determine whether the tariff rates were unreasonable even though respondent requested such a determination. We therefore must assume, for purposes of our decision today, that the rates were reasonable. The issue of the reasonableness of the tariff rates is open for exploration on remand.

110 S.Ct. at 2767 n.10 (emphasis added). In Orr this court

remanded, after reversing a similar ICC decision, based on footnote 10 in Maislin. Orr, 912 F.2d at 122.

Rebel argues that the unreasonableness of tariff rates cannot be asserted as a defense to a shipper's obligation to pay the tariff rate, citing T.I.M.E. v. United States, 359 U.S. 464 (1959). In T.I.M.E., a carrier sued a shipper to collect freight charges. The shipper defended by asserting that the rates were unreasonable under the Motor Carrier Act. The Court held that Congress did not intend to enable shippers to assert "unreasonableness" as a defense in suits to recover tariff rates. Instead, the reasonableness requirement "creates only a 'criterion for administrative application in determining a lawful rate' rather than a 'justiciable legal right.'" 259 U.S. at 469 (citation omitted). In the wake of T.I.M.E., Congress amended the Interstate Commerce Act to enable shippers to recover reparations for unreasonable rates. Rebel concludes that Sunshine's only avenue to challenge the reasonableness of a rate after the shipment is through a reparations proceeding. See Mohasco Industries v. Acme Fast Freight, 491 F.2d 1082, 1084 (5th Cir. 1974) (applying T.I.M.E. for holding that statutory reparations remedy provided "the sole and exclusive remedy for excessive charges.").

Unfortunately for Rebel, the precedential value of T.I.M.E. has been greatly eroded. Justice Stevens acknowledged as much in his dissent in Maislin:

> [In] the 5-4 decision in T.I.M.E., . . . this Court prohibited district courts from staying collection proceedings pending agency review of the reasonableness of a filed rate. Although T.I.M.E. is strikingly similar to today's decision in a host of respects, the majority does not rely on it. Its reluctance to place any substantial weight upon T.I.M.E. is easily understood, because that precedent was greatly limited by this Court's subsequent decision in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 88-89 [1962], and what remained of it was

> thereafter unambiguously repudiated by Congress.

Maislin, 110 S.Ct. at 2776-77 n.12 (Stevens, J., dissenting). Thus, T.I.M.E. is not dispositive of this case, and Sunshine is not required to pursue reparations as its sole remedy.

Rebel also relies on an unpublished post-Maislin case from the Third Circuit, Branch Motor Express company v. Caloric Corp., No. 89-1130, slip op. (3d Cir.Aug. 14, 1990). Branch Motor presented facts somewhat similar to the case at bar. The Third Circuit did not remand to the ICC on the reasonableness issue because the shipper "never supplied any support for its proposition that [the carrier's] rates were unreasonable." Id, at 3. Branch Motor also interpreted footnote 10 in Maislin to mean that "the Supreme Court was taking no position on whether re-referral to the ICC was appropriate." Id at 4.

We agree that footnote 10 in Maislin does not require a remand in every case where unreasonableness of rates is alleged; however, the lack of evidence in Branch Motor was the Third Circuit's reason for not remanding to the ICC. In this case, Sunshine is prepared to put on evidence regarding the unreasonableness of the rates. Branch Motor also relies on the fact that because the shipper did not succeed in establishing the unreasonableness of the rates before the ICC, the "mere mention of rate unreasonableness [on appeal], entirely unsupported . . . is not sufficient to give it a second bit at the apple." Id, at 4.

Sunshine has not yet had an opportunity to present its evidence to the ICC. In Branch Motor, by contrast, the shipper has no evidence whatsoever on this issue. Rebel's argument, which emphasizes that reparations provides the only remedy, does not provide an opportunity for the ICC to address the reasonableness of rates. As a carrier subject to the jurisdiction of the Interstate Commerce Commission, Rebel had an obligation under section 10701 to keep its rates "reasonable". A remand to the ICC effectuates this purpose.

We do not, however, interpret Maislin to require a re-referral to the ICC in every suit by a carrier to collect undercharges. The point of Maislin was to prevent undercutting of the filed rate doctrine through separate agreements between shippers and carriers. Requiring a ruling from the ICC on reasonableness in every case would weaken the "strict adherence" to the filed rate doctrine required by Maislin. 110 S.Ct. 2771. In this case, however, we conclude that a remand to the ICC for consideration of the reasonableness issue is appropriate.

The decision of the ICC is **REVERSED**, and the matter is **REMANDED** back to the ICC for a determination of the reasonableness issue.

A true copy
Attest:
Leonard Green, Clerk

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30140

SUNSHINE MILLS, INC.
v.
REBEL MOTOR FREIGHT, INC.[1]

Decided: July 25, 1989
Service date: July 31, 1989

By complaint filed December 20, 1988, Sunshine Mills, Inc. (Sunshine) seeks a determination that it would be an unreasonable practice under 49 U.S.C. 10701(a) to allow Rebel Motor Freight, Inc. (Rebel) to collect undercharges of $6,007.60 for nine shipments of dog food transported in 1983 from Sunshine's facility at Tupelo, MS to points in Texas. This case was referred to the Commission by the Circuit Court of Tennessee for the Thirtieth Judicial District, at Memphis, in Docket No. 18345-8 T.D., Rebel Motor Freight, Inc. v. Sunshine Mills, Inc. The complaint raises issues of negotiated rates address in NITL-Pet. to Inst. Rule on Negotiated Motor Car., 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989) (Negotiated Rates).

PRELIMINARY MATTERS

In its complaint, Sunshine named James W. Moore, owner and president of Rebel, as co-defendant. Mr. Moore subsequently filed a motion to dismiss the complaint as to him individually. He argues that the Commission lacks jurisdiction over him personally and that he is not a party to the court proceeding. Complainant replied. We will grant the motion.

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[1] This proceeding formerly was titled Sunshine Mills, Inc. v. Rebel Motor Freight, Inc., and James W. Moore. See discussion infra.

As an individual, Mr. Moore is not subject to the Commissions' jurisdiction. Moreover, his participation as a defendant is not necessary to the resolution of the issues before us.

Rebel also filed a motion to dismiss the complaint against it on the ground that the Commission lacks jurisdiction to grant the relief sought. Sunshine replied. We address this jurisdictional issue infra, and find Rebel's position without merit. Accordingly, we will deny the motion.

BACKGROUND

Sunshine manufactures dog food and other related products. Darrell Smith, Sunshine's plant manager, submitted a verified statement in support of the complaint. In early 1983, Johnny Price, Rebel's sales representative, called Mr. Smith to solicit Sunshine's traffic. They discussed a price range from $1.15 to $1.20 per mile, based on the cost of Sunshine's own private carriage operations. As a result of that discussion, Julian Hodge, Rebel's Tupelo terminal manager, confirmed in writing to Roy Turner, Sunshine's assistant plant manager, a rate of $1.18 per mile to Texas points. A copy of that letter, dated June 28, 1983, was submitted here. Rebel thereafter handled nine truckload shipments for Sunshine between October 6, and December 30, 1983. Rebel billed Sunshine at the quoted rate, and Sunshine paid the billed amounts. Not until 1986, when Rebel began to liquidate its operations, did Sunshine learn that the quoted rate had not been published in a tariff.

Rebel does not dispute this evidence. It simply advances jurisdictional arguments against our hearing the complaint.

DISCUSSION AND CONCLUSIONS

In our first Negotiated Rates decision, we adopted a policy statement holding that the filed rate doctrine does not necessarily bar defenses against undercharge claims filed by common carriers. We considered and discussed jurisdictional

arguments against this policy in Wakefern Food Corp. v. Southwest Frgt. Lines, Inc., 3 I.S.C.2d 814 (1987), where we rejected assertions that the charges contained in an applicable tariff must be assessed regardless of the circumstances. We concluded that the decisions in Negotiated Rates and Buckeye Cellulose Corp. v. L&N R.R. Co., 1 I.C.C.2d 767 (1985), aff'd sub nom. Seaboard System Railroad v. United States, 794 F.2d 635 (11th Cir. 1986), confirm that our primary jurisdiction over unreasonable practices under section 10701(a) and section 10704 gives us the authority to consider all the circumstances surrounding an undercharge suit. In our most recent Negotiated Rates decision served June 29, 1989, we discussed and reaffirmed our authority to consider negotiated rates cases under our unreasonable practice jurisdiction.

Application of the negotiated rates policy is intended to temper the harsh effects of the filed rate doctrine when it can be shown that the shipper and carrier negotiated and agreed upon a rate that was not published in a tariff. Our role in such cases is to undertake an analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts, and to determine: (a) whether collection of undercharges based on the rate contained in the published tariff would constitute an unreasonable practice; and (b) if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect.

In Wakefern, supra, we determined that an opinion in favor of the shipper under the Negotiated Rates precedent requires two basic findings: (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom the shipper could legitimately rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the quote.[2]

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[2] While in Negotiated Rates we made it clear that it would be unreasonable to require shippers to determine, prior to each transportation movement, whether the agreed rate is actually on file, we did not eradicate the doctrine that the rate filed is a matter of public record and that the

We are satisfied that a negotiated rate was agreed to in this case by Sunshine and Rebel. Not only has the shipper testified concerning the circumstances surrounding the initiation of service by Rebel and its understanding, prior to the movement of its traffic, of the charges for such service, but we also have Rebel's written confirmation of the agreed-to rate. The evidence, then, is clear that an agreement was reached to transport Sunshine's traffic at the rate of $1.18 per mile, and that Sunshine was billed at and paid that negotiated rate.

Moreover, we find that Sunshine reasonably relied on the representations of Mr. Hodge, Rebel's terminal manager, in view of his position of authority with Rebel and the fact that his representations were repeatedly confirmed by Rebel's subsequent billings. Accordingly, we conclude that it would be an unreasonable practice to require Sunshine to pay undercharges now for the shipments handled by Rebel pursuant to their negotiated agreements.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to dismiss the complaint as to James W. Moore is granted.

2. The motion to dismiss the complaint as to Rebel is denied.

3. This proceeding is discontinued.

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shipper is charged with constructive notice of the actually filed rate. In situations such as these, we are determining whether, under the circumstances, adherence to the filed rate doctrine would constitute an unreasonable practice.

4. A copy of this decision will be mailed to the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis.

5. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX C

LIST OF CASES REFERRING RATE REASONABLENESS ISSUE TO ICC

Brown v. Manville Products Corp., No. C-89-2386 VRW, ND CA, 11/15/90

Delta Traffic Service, Inc. v. Transtop, Inc., 902 F.2d 101 (1st Cir. 1990)

Delta Traffic Service, Inc., Assignee of Claxton Transport, Inc. v. Snider d/b/a Smoky Snider Distributing Co., Inc.; A90A1246; *Delta Traffic Service, Inc., Assignee of Claxton Transport, Inc. v. Gusto Brands, Inc. et al*, A90A1287; *Delta Traffic Service, Inc., Assignee of Claxton Transport, Inc. v. Dixie-Riverside, Inc.*, A90A1376, GA Court of Appeals, 10/25/90, 1991 Fed.Car.Cas. ¶83,587

Freightcor Services, Inc., Debtor in Possession, v. The BF Goodrich Co., OH Ct of Common Pleas, Cty of Summitt, No. CV 90 8 2803, 1991 Fed.Car.Cas ¶83,611, 2/4/91

Horn's Motor Express, Inc., Mark Services, Inc. v. Anchor Glass Container, No. 1:CV-90-1030, USDC MD PA, 1991 Fed.Car.Cas ¶83,629, 2/14/91

Horn's Motor Express, Inc., Mark Services, Inc. v. Harrisburg Paper Co., No. 1:CV-90-1031, USDC, MD PA, 5/28/91

James G. Duffy, Trustee for Canny Trucking Co., Inc. v. BMC Industries, Inc. d/b/a Buckbee-Mears-Courtland Co. and James G. Duffy, Trustee for Canny Trucking Co., Inc. v. Marietta Corp., No. 90-7133, U.S. Second Circuit Court of Appeals, 6/28/91

In Re: American Freight System, Inc., Debtor, No. 88-41050-11. American Freight System, Inc. v. U.S. National Resources, Inc. a/k/a Friedrich Air Conditioning, Adv. No. 90-7248, USBC, D KS, 4/16/91

In Re: Murphy Motor Freight Lines, Inc., Bky 3-87-577. Brian Leonard, Trustee of the Bankruptcy Estate of Murphy Motor Freight Line, Inc. v. General Mills, Inc., Adv. No. 3-89-201, USBC, D MN, 3rd Div., 4/3/91

In Re: R.F.I. Transport, Inc., Debtor. Kay Clements, Trustee for the Bankruptcy Estate of R.F.I. Transport, Inc. v. S.R.B. Tech Transport, No. 89 S 954, 89 S 1069, USDC, D CO, 1991 Fed.Car.Cas ¶83,626, 12/6/90

In Re: Sharm Express, Inc., Debtor, Bky No. 4-87-3241-RJK; *Edward W. Bergquist, Trustee in the Bankruptcy Estate of Sharm Express, Inc. v. 7/24 Freight Sales, Inc.*, USDC, D MN, 4th Div., Adv. No. 4-89-337, 122 B.R. 999, 1/17/91

In Re: Southwest Equipment Rental, Inc. d/b/a Southwest Motor Freight, Debtor, No. 88-00033; *C. Kenneth Still, Trustee v. Armstrong World Industries, Inc.*, USBC, ED TN, Adv. No. 89-0178, 1991 Fed.Car.Cas. ¶83,597, 1/8/91

Maislin Industries, US, Inc. et al v. Primary Steel, Inc., USDC, WD MO, WD, No. 85-0021-CV-W-JWO-5, 11/21/90

Overland Express, Inc. v. International Multifoods, No. IP 90-801-C, USDC, SD, IN, 12/5/90

Rebel Motor Freight, Inc. v. Lowe's Companies, Inc., Chancery Court of Shelby County, TN, No. 93576-3, 2/28/91

Scott Brown, Jr., Trustee for Express Transportation Co., Inc. v. Manville Products Corporation, USDC, ND CA, No. C-89-2386-VRW, 11/15/90

Steven Gale, Assignee of Certified Carriers of America, Inc. v. Norwesco, Inc., USDC, D MN, 4th Div., 1991 Fed.Car.Cas. ¶83,607, 12/11/90

William J. Hunt, Trustee for Ritter Transportation, Inc. v. Superbond, Inc., Civil Action No. 89-5244, USDC, ED PA, 5/16/91

LIST OF CASES REFUSING TO REFER TO ICC

Atlantis Express, Inc. v. N & M Nationwide, Inc., 90-1815 and *The Bankruptcy Estate of United Shipping, Inc. v. National Automotive & Rubber Marketing, Inc.*, 90-1814 in the USDC, D MN, 4th Div, 11/23/90

Atlantis Express, Inc. v. Unicorn Transportation Systems, Inc. et al, No. Div. 4-90-232 and 233, USDC, D MN, 4th Div, 1991 Fed.Car.Cas ¶83,627, 3/19/91

Advance-United Expressways, Inc. v. Duro Metal Manufacturing Co., Inc., USDC, ND TX, Dallas Div, No. CA 3-89-2442-G, 11/30/90

Advance-United Expressways, Inc. v. Eastman Kodak Co., USDC, ND TX, Dallas, Div, No. CA 3-89-2025-G, 11/30/90

Bergquist v. LaSalle-Deitch Co. (In Re: Sharm), Civ.No. 4-90-727, USDC, D MN, 2/7/91

Branch Motor Express Co. v. Caloric Corporation, 89-1130, Third Cir., 8/14/90

Delta Traffic Service, Inc. & Oneida Motor Freight, Inc. v. Appco Paper & Plastic Corp., No. 88-9057, 2nd Cir., 1991 Fed.Car.Cas ¶83,621, 4/18/91

Edward W. Bergquist, Trustee of the Bankruptcy Estate of Sharm Express, Inc. v. Twin Modal, Inc., USBC, D MN, Bky No. 4-87-3241-RJK, Adv. No. 4-89-401-RJK, 10/14/90 (reversed by subsequent District Court decision)

In the Matter of Maislin Industries, US, Inc., Debtor, No. 83-03161-R. Stuart Gold, Trustee v. A. J. Hollander & Co. et al, Adv. No. 85-0076-R, USBC, ED MI, So. Div, 11/14/90

In Re Oneida Motor Freight, Inc., Debtor, USBC, D NJ, Case No. 85-03606; *Oneida v. The Ormond Shops*, Adv. No. 87-0527; *Oneida v. Thomas J. Lipton*, Adv. No. 87-0642; *Onedia v. Lionel Leisure, Inc.*, Adv. No. 87-0664, 11/8/90 (reversed and referred), 1990 Fed.Car.Cas ¶83,586 (reversed by subsequent District Court decision)